

APPLYING GATT DISPUTE SETTLEMENT PROCEDURES TO A TRADE IN SERVICES AGREEMENT: PROCEED WITH CAUTION

LISA SUE KLAIMAN*

1. INTRODUCTION

The General Agreement on Tariffs and Trade¹ ("General Agreement") is the paramount multilateral treaty on international trade in goods. Developed by Western nations in 1948 during the cooperative period following World War II,² the General Agreement encourages the free flow of worldwide trade in goods by reducing domestic trade barriers to foreign imports.³ When the rules of the General Agreement

* J.D. Candidate 1990, University of Pennsylvania; B.S. 1985, University of Virginia.

¹ General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187 (*entered into force* Jan. 1, 1948) [hereinafter GATT]. The text of the General Agreement has been modified and supplemented since 1947. The current version is contained in 4 GATT, Basic Instruments and Selected Documents [hereinafter BISD] (1969).

"General Agreement" conventionally refers to the agreement. "GATT" refers to the organization and collectively to the organization and its agreements.

² See Ehrenhaft, *A U.S. View of the GATT*, 14 INT'L BUS. LAW 46, 46 (1986). See also Yeutter, *An Agenda for the New GATT Round*, in LAW AND PRACTICE UNDER THE GATT [hereinafter LAW & PRACTICE] III at (K. Simmons & B. Hill ed. Jan. 1988) (Address by United States Trade Representative, Clayton Yeutter before the U.S. Chamber of Commerce) (Sept. 10, 1986) [hereinafter C. Yeutter].

GATT was originally designed as a temporary measure to govern world trade while the International Trade Organization (ITO) was established. When the ITO proposal was not approved by the United States Congress, GATT became the sole and permanent arbiter of world trade. Recent Developments, *International Trade: The General Agreement on Tariffs and Trade*, 29 HARV. INT'L L.J. 199, 199 n. 1 (1988). See generally TRADE POLICIES FOR A BETTER FUTURE at 157-160 (1987) [hereinafter LEUTWILER REPORT].

For in-depth discussions of the history of GATT and the General Agreement, see generally J. JACKSON, *WORLD TRADE AND THE LAW OF GATT* (1969); R. HUDEC, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY* (1975); K. DAM, *THE GATT - LAW AND INTERNATIONAL ECONOMIC ORGANIZATION* (1970).

³ J. ARONSON & P. COWHEY, *TRADE IN SERVICES: A CASE FOR OPEN MARKETS* 24 (1984). There are three basic concepts underlying GATT. The cornerstone of the General Agreement is "Most-Favored-Nation treatment" (MFN), which mandates that each contracting party accord equal treatment to all other contracting parties. GATT, *supra* note, at art. I. The "national treatment" doctrine calls for the equal internal taxation and regulation of foreign and domestic products. GATT, *supra* note 1, at art. III. The "reciprocity" concept concerns multilateral concessions and mutual advantages. GATT Preamble. See generally O. LONG, *LAW AND ITS LIMITATIONS IN*

are followed, uncertainty in international trade decreases, while international investment, trade, and economic growth increase.⁴

Ninety-six nations are "contracting parties" to GATT as signatory members of the General Agreement, and twenty-nine countries are provisional members.⁵ A *de facto* organization, referred to as "the GATT," developed in the early years of GATT to administer the General Agreement.⁶ Otherwise, the General Agreement does not provide for a formal governing organization; all administrative powers are legally vested in the Contracting Parties acting as a collective body.⁷

In September, 1986, trade ministers and representatives from over 70 contracting parties met in Punta del Este, Uruguay, and agreed to launch the eighth round of global trade negotiations under GATT's auspices.⁸ The "Uruguay Round" is scheduled to end in December, 1990. During these four years of talks, the contracting parties hope to reduce barriers to international commerce, limit trade-distorting regulations, strengthen current GATT procedures, and integrate new types of goods and services into the GATT system.⁹

THE GATT MULTILATERAL TRADE SYSTEM 8-11 (1985).

⁴ Aho, *The Uruguay Round: Will It Revitalize the Trading System?*, 11 FLETCHER F. 1, 4 (1987). The United States Trade Representative has claimed that GATT has "arguably done more over the past 40 years to promote the cause of peace and prosperity than any other international body." C. Yeutter, *supra* note 2, at 2.

⁵ LAW & PRACTICE, *supra* note 2, Introduction at 28; GATT INFORMATION AND MEDIA RELATIONS DIVISION, GENERAL AGREEMENT ON TARIFFS AND TRADE: WHAT IT IS, WHAT IT DOES 2, 22 (1989). Six applications for full membership are currently pending (China, Costa Rica, Tunisia, Algeria, Bulgaria and Bolivia), as are three applications for provisional accession (Honduras, El Salvador and Guatemala). *Law & Practice*, Introduction *supra* note 2, at 28-29.

⁶ See *supra* note 1. The organizational structure is fully described in J. JACKSON, *supra* note 2, at 119-62 (1969) and O. LONG, *supra* note 3, at 44-54.

⁷ GATT, *supra* note 1, at art. XXV. "Contracting Parties," when capitalized, refers to the parties to the General Agreement acting as a collective body. Uncapitalized, the reference denotes the contracting parties acting individually.

⁸ OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, URUGUAY ROUND PROGRESS REPORT 22 (Dec. 14, 1988). The other GATT rounds were: Geneva (1947) (establishing GATT); Annecy, France (1949); Torquay, Great Britain (1950-51); Geneva (1955-56); the "Dillon Round" in Geneva (1961-62); the "Kennedy Round" in Geneva (1964-67); and the "Tokyo Multilateral Trade Negotiations Round" (MTN Round or Tokyo Round) in Geneva (1973-79). See generally LEUTWILER REPORT, *supra* note 2, at 160-69.

Until the Kennedy Round, talks were aimed at reducing tariffs. Since then, the objective has been to reduce non-tariff barriers (NTB's). Significant progress was first made toward this goal during the Tokyo Round, where a series of agreements were reached regarding non-tariff measures such as subsidies, technical barriers to trade, import licensing procedures, government procurement practices, customs valuation and anti-dumping procedures. *Id.*

⁹ See Recent Developments, *supra* note 2, at 199. For a detailed discussion of the objectives of the Uruguay Round, see generally LEUTWILER REPORT *supra* note 2; C. Aho & J. Atkinson, TRADE TALKS: AMERICA BETTER LISTEN! (1985).

Integrating services trade into GATT, either by incorporating services into the General Agreement or by creating a side agreement, is one of the most visible and contentious issues on the negotiating table. One of the issues that the negotiators must address is the appropriate method for resolving the disputes that inevitably will arise under the agreement. Credible dispute resolution procedures are needed to preserve the integrity of whatever agreement is reached.¹⁰

An obvious solution, urged by the United States,¹¹ is to apply all existing GATT dispute settlement procedures to a services agreement. However, the contracting parties, including the United States, are dissatisfied with various aspects of the current system; reform of GATT's dispute settlement mechanism is also high on the Uruguay Round agenda. Although the contracting parties recognize the need for reform generally, debate exists over the direction that these changes should take.

The GATT model does provide a useful framework from which to develop a dispute settlement procedure for a trade in services agreement. Direct extension of GATT procedures to services trade, however, may be inappropriate or impractical, because trade in services differs from trade in goods in many ways.¹² For instance, GATT dispute settlement procedures work well for narrowly focused or technical issues,¹³ but initial disputes arising under the services agreement likely would deal with broad questions of general applicability and

¹⁰ *Overall Approach - New Round of Trade Negotiations - in Defence of Open Multilateral Trade*, adopted by the Council of Ministers of the European Community following meetings of June 16-17, 1986 [hereinafter *In Defence of Open Multilateral Trade*], reprinted in *Law & Practice supra* note 2, at § III.B.2. at 29. The viability of the services agreement will depend on its ability to resolve disputes effectively and satisfactorily. Note, *Liberalization of International Trade in the Service Sector: Threshold Problems and a Proposed Framework Under the GATT*, 5 *FORDHAM INT'L L.J.* 371, 407 (1982). See also *THE URUGUAY ROUND: A HANDBOOK ON THE MULTILATERAL TRADE NEGOTIATIONS* 11 (1987) [hereinafter *HANDBOOK*].

¹¹ See OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, *URUGUAY ROUND-PROGRESS REPORT 4* (Oct. 18, 1988) [hereinafter *PROGRESS REPORT* of Oct. 18, 1988]. See also Schott, *Protectionist Threat to Trade and Investment in Services*, 6 *WORLD ECON.* 195, 208-09 (1982).

¹² J. ARONSON & P. COWHEY, *supra* note 3, at 24, 28. See also Sauvant, *The International Policy Discussion: International Fora*, reprinted in *Law & Practice, supra* note 2, § VI at 18-19 (excerpt from *International Transactions in Services: The Politics of Transborder Data Flows*, chap. V (1986)).

¹³ U.S. Int'l Trade Comm'n, Pub. No. 1793, *Review of the Effectiveness of Trade Dispute Settlement under the GATT and the Tokyo Round Agreements* 83 (1985) (Report to the Committee on Finance, U.S. Senate, on Investigation No. 332-212 under Section 332(g) of the Tariff Act of 1930) [hereinafter *ITC Dispute Settlement Study*]. Panels are not effective in setting broad policy for each issue they decide. deKieffer, *GATT Dispute Settlements: A New Beginning in International and U.S. Trade Law*,

jurisdiction.

This Comment explores the wisdom of applying existing GATT dispute settlement procedures to a new trade in services agreement, specifically addressing the general philosophical approach that should be followed in resolving disputes under a services agreement. Part II provides an overview of GATT's current dispute settlement procedure, its problems, and its recent improvements. Part III describes the unique problems that will arise in developing a services agreement, including both trade and non-trade issues. Part IV examines whether GATT procedure, as existing or as modified, would be effective in resolving disputes arising under a trade in services agreement.

2. GATT DISPUTE SETTLEMENT PROCEDURE

2.1. Procedure

The GATT dispute settlement system "is a central element in providing security and predictability to the multilateral trading system."¹⁴ The aim of the procedures is "to provide an orderly process for maintaining or restoring the balance of concessions when a contracting party violates a tariff concession or contravenes one of the rules of the agreement."¹⁵ Hence, the objective of the procedures is not to ensure compliance with the law, but to arrive at understandings and mutually acceptable settlements between disputing parties.¹⁶

A violation can consist of any matter "affecting the operation of [the General Agreement],"¹⁷ to conduct which the complaining party considers to be impairing or nullifying "any benefit accruing to it directly or indirectly under [the Agreement]," or to conduct that is impeding the party's attainment of any objective of the Agreement.¹⁸ Despite over thirty references to dispute settlement procedure in the General Agreement,¹⁹ the Agreement contains "no single, sharply de-

¹⁴ *Record of Multilateral Trade Negotiations: The Uruguay Round, Midterm Meeting* [hereinafter *Multilateral Trade Negotiations*], Trade Negotiations Committee Doc. MTN.TNC/11 at 24 (April 21, 1989).

¹⁵ *ITC Dispute Settlement Study*, *supra* note 13, at 1.

¹⁶ See LEUTWILER REPORT, *supra* note 2, at 120. See also GATT Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement, Annex to Understanding Regarding Notification, Consultation, Dispute Settlement, and Surveillance, BISD, *supra* note 1, at 215. 4 (26th Supp. 1980) [hereinafter Annex].

¹⁷ GATT, *supra* note 1, at art. XXII:1.

¹⁸ GATT, *supra* note 1, at art. XXIII:1.

¹⁹ Most provisions provide for consultation, at times exclusively. See, e.g., GATT, *supra* note 1, at arts. II:5, VI:7, VII:1, VIII:2, IX:6, XII:4, XIII:4, XVI:4, XVIII, XIX:2, XXIV:7, XXVI, XXVIII:1, XXXVII:2 XXXVII:4. See also Davey, *Dispute Settlement in GATT*, 11 *FORDHAM INT'L L.J.* 51, 54 (1987).

fined dispute-settlement procedure."²⁰ Articles XXII and XXIII, the two provisions most relevant to dispute settlement,²¹ provide only an outline of how to handle disputes.²² The 1979 Understanding Regarding Notification, Consultation, Dispute Settlement, and Surveillance²³ ("Understanding") and Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement ("Annex")²⁴ codified the informal dispute settlement procedures that had developed through custom over the previous three decades. Most notably, the Understanding and Annex explicitly recognized the panel process, which had played a central role in dispute resolution since 1952.²⁵

Dispute settlement under GATT is a quasi-judicial process consisting of five main steps. First, a complaining contracting party must attempt to settle a dispute over alleged GATT violations through bilateral consultations with the offending contracting party. The offending government must give the complaining party's request for bilateral consultations "sympathetic consideration."²⁶ If bilateral consultation fails

²⁰ J. JACKSON, *supra* note 2, at 164.

²¹ *Id.* at 166. GATT, *supra* note 1, at Article XXII (Consultation) provides for consultation on any matter violating the Agreement. See GATT, *supra* note 1, at art. XXII:1.

GATT, *supra* note 1, at Article XXIII (Nullification or Impairment) covers situations where a contracting party considers "that any benefit accruing to it directly or indirectly under [the General Agreement] is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of (a) the failure of another contracting party to carry out its obligations. . . , (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or (c) the existence of any other situation. . . ." GATT art. XXIII:1. Subsection (a) refers to specific violations of the General Agreement, while subsections (b) and (c) offer protection against government measures that, even if not in violation of specific GATT obligations, nullify or impair indirect benefits provided under the GATT. GATT, *supra* note 1, at art. XXIII; J. JACKSON, *supra* note 2, at 179-80.

While not all violations under Article XXIII fall under Article XXII, any violation of the Agreement under Article XXII is *prima facie* a violation under Article XXIII. Annex, *supra* note 16, at ¶¶ 4-5.

²² Davey, *supra* note 19, at 57.

²³ Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, BSD, *supra* note 1, at 210 (26th Supp. 1980) [hereinafter Understanding].

²⁴ See Annex, *supra* note 16.

²⁵ *ITC Dispute Settlement Study*, *supra* note 13, at 27-28. The nine agreements reached during the Tokyo Round contain independent provisions for dispute settlement. While the dispute mechanisms generally follow those used for the General Agreement, certain procedures are more rigorous, such as the use of recommended timetables for each step of the process. *Id.* at vii.

For an overview of the dispute settlement procedure, see generally LEUTWILER REPORT, *supra* note 2, at 119-135.

²⁶ "Each contracting party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as may be made by another contracting party with respect to any matter affecting the operation of

to settle the dispute, either party may seek the good offices of the Director-General of GATT or another appropriate party for assistance.²⁷

If neither consultation nor the use of good offices results in a satisfactory settlement, the complaining party may then refer the matter to the Contracting Parties or to the GATT Council, which is empowered to act for the Contracting Parties.²⁸ The complaining party may also request that a panel or working party be established to assist the Contracting Parties in evaluating the dispute.²⁹ Although the right to a panel is not automatic and requires approval by a consensus of the Contracting Parties, apparently no request has ever been refused.³⁰

The function of a panel is to "review the facts of a case and the applicability of GATT provisions and to arrive at an objective assessment" of the dispute.³¹ The panel then prepares an advisory report to the Contracting Parties, detailing its findings and recommendations for

[the] Agreement." GATT, *supra* note 1, at art. XXII:1. The parties also have the option of requesting multilateral consultation with the Contracting Parties if bilateral consultation proves unsuccessful. GATT, *supra* note 1, at art. XXII:2.

Pursuant to GATT Article XXIII, a complaining party "may, with a view to satisfactory adjustment of the matter, make written representations or proposals to the [allegedly infringing contracting party or parties]. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it." GATT, *supra* note 1, at art. XXIII:1. See also Understanding, *supra* note 23, at ¶ 4.

²⁷ Understanding, *supra* note 23, at ¶ 8.

²⁸ Annex, *supra* note 16, at ¶ 1 n. 1. Future references to "Contracting Parties" will refer as well to the GATT Council.

²⁹ If "a contracting party invoking Article XXIII:2 requests the establishment of a panel to assist the Contracting Parties to deal with the matter, the Contracting Parties [will] decide on its establishment in accordance with standing practice. . . . [S]uch requests [will] be granted only after the contracting party concerned [has] had an opportunity to study the complaint and respond to it before the Contracting Parties." Understanding, *supra* note 1, at ¶ 10.

Panels are the procedure typically employed; since 1953, only three working parties have been convened. Annex at ¶6(ii); Petersmann, *International and European Foreign Trade Law: GATT Dispute Settlement Proceedings Against the EEC*, 22 COMMON MKT. L. REV. 441, 469 n.71 (1985). A "panel" generally consists of three or five independent experts, most often members of third-party GATT delegations who are to act in their individual, not governmental, capacities. Understanding, *supra* note 23, at ¶¶ 11, 14.

A "working party" is opened to all interested contracting parties and typically consists of five to twenty participants including the disputants. Annex, *supra* note 16, at ¶ 6(i). Working parties are less "formal" than panels.

³⁰ See Understanding, *supra* note 23, at ¶ 10; Hudec, *GATT Dispute Settlement After the Tokyo Round: An Unfinished Business*, 13 CORNELL INT'L L.J. 145, 175 n. 88 (1980). Some requests have been deferred and eventually "dropped," however. *Id.*

³¹ Annex, *supra* note 16, at ¶ 3. See also *infra* notes 54, 186 and accompanying text (terms of reference slightly modified at Montreal meeting). The function of the panel is to interpret the General Agreement, not to "state the law" in the manner of courts or arbitral tribunals. LEUTWILER REPORT, *supra* note 2, at 122. A summary of the panel procedure can be found in the Annex at paragraph six.

resolution of the dispute. The report generally should include the panel's rationale. The panel report itself is not binding upon the Contracting Parties and does not establish legal precedent.³² A draft of the report is first submitted to the disputants for comment, with the intent of provoking a voluntary settlement. If settlement is reached, the panel's final report to the Contracting Parties briefly states the facts of the case and notes that a settlement was reached.³³

If settlement is not reached, the Contracting Parties, including the disputing parties, decide by consensus either to adopt, modify or reject the panel's report and recommendations. Theoretically, the parties to the dispute are not to obstruct the process. Although a majority vote can always replace consensus,³⁴ the General Agreement's one-nation/one-vote procedure has never been used. As a result, a losing party can delay adoption of the panel report indefinitely.³⁵ Upon adoption, the panel report takes on legal force under Article XXIII:2 and "entail[s] a legal obligation to withdraw any measure inconsistent with GATT."³⁶

After the Contracting Parties adopt the findings and recommendations of the panel, the "guilty" party decides whether and in what manner it will comply with the recommendations. A party that is sanctioned also has the drastic option of withdrawing from GATT.³⁷ If the complaining party is not satisfied with the compliance efforts, it may raise the issue with the Contracting Parties.³⁸ As a last resort, the winning party may request authorization to retaliate against the offending party by suspending certain concessions or obligations with respect to that party under Article XXIII:2.³⁹ Retaliation has been used only once.⁴⁰ Recourse to retaliatory sanctions is not in keeping with the aim

³² *But see infra* notes 190-92 and accompanying text.

³³ Understanding, *supra* note 23, at ¶¶ 16-18; Annex, *supra* note 16, ¶ 6. The panel encourages the disputing parties to reach a voluntary settlement throughout the panel process. *Id.*

³⁴ See GATT, *supra* note 1, at art. XXV:4.

³⁵ See Davey, *supra* note 19, at 85.

³⁶ Petersmann, *supra* note 29, at 470. The Contracting Parties have adopted panel reports almost invariably without amendment or extensive discussion. *Id.*

³⁷ GATT, *supra* note 1, at art. XXIII:2.

³⁸ Understanding, *supra* note 23, at ¶ 22. The Contracting Parties "shall keep under surveillance any matter on which they have made recommendations or given rulings." *Id.*

³⁹ GATT, *supra* note 1, at art. XXIII:2. To suspend obligations means to impose otherwise prohibited trade restrictions.

⁴⁰ Annex, *supra* note 16 at ¶ 4. In 1955, in the "U.S. Dairy Quotas" case, GATT found that U.S. quotas on imports of dairy products violated Article XXIII, resulting in injury to the Netherlands. When the United States refused to remove the quotas, GATT permitted the Netherlands to impose quotas on wheat imports from the United States. GATT, Suspension of Certain Obligations to the United States by the Kingdom of the Netherlands, *BSID*, *supra* note 1, at 31-32 (4th Supp. 1956) [herein-

of the dispute settlement procedure, which is to restore the balance of concessions between the parties,⁴¹ not to punish the offender.⁴²

While other provisions of the General Agreement permit governments to withdraw or suspend obligations unilaterally without prior authorization in order to restore the balance of reciprocity, contracting parties rarely resort to such sanctions.⁴³ Article XIX, for example, authorizes governments to impose emergency barriers against imports that are causing serious injury to domestic markets.⁴⁴ When used, these provisions serve the same purpose as retaliation under Article XXIII.⁴⁵

2.2. Problems

During the first decade of GATT's existence, the dispute settlement procedure showed considerable promise and was perceived as successful.⁴⁶ In the 1960's and early 1970's, however, governments hesitated or refused to invoke Article XXIII procedures, believing that they were ineffective.⁴⁷ Since the late 1970's, the system seems to have gained renewed favor,⁴⁸ although many believe the system remains "woefully inadequate."⁴⁹ Critics note that the system has handled only minor issues successfully in recent years; the tougher and more contentious disputes remain unresolved.⁵⁰ The mandate for the Uruguay Round is to improve and strengthen the rules and procedures of the dispute settlement process, especially those regarding compliance with adopted recommendations, "in order to ensure prompt and effective res-

after *U.S. v. Netherlands*]; Note, *Current Efficacy of the GATT Dispute Settlement Process*, 22 TEX. INT'L L.J. 87, 97 (1986).

⁴¹ LEUTWILER REPORT, *supra* note 2, at 102.

⁴² *Id.*

⁴³ R. HUDEC, *supra* note 2, at 182-83. These remedies are rarely invoked because the offending governments normally agree to compensate the injured party in the form of tariff reductions. *Id.* at 183.

⁴⁴ See e.g., GATT, *supra* note 1, at art. XIX (the "escape clause" or "safeguards" provision); *id.* at art. XXVIII (modification or withdrawal of concessions); *id.* at art. XXV:5 (waivers).

⁴⁵ R. HUDEC, *supra* note 2, at 182-83.

⁴⁶ Jackson, *Governmental Disputes in International Trade Relations: A Proposal in the Context of GATT*, 13 J. WORLD TRADE L. 1, 5 (1979).

⁴⁷ *Id.* From 1962-72 the contracting parties, except for the United States, virtually abandoned use of GATT dispute settlement machinery. Use of the dispute process increased in the years from 1973-77, and by the end of 1979, the dispute procedure had "restored itself to a vigorous and broadly based level of activity." HuDEC, *supra* note 30, at 181-82.

⁴⁸ See LEUTWILER REPORT, *supra* note 2, at 102-03.

⁴⁹ Jackson, *supra* note 46.

⁵⁰ LEUTWILER REPORT, at 129-30; *ITC Dispute Settlement Study*, *supra* note 13,

olution of disputes to the benefit of all Contracting Parties.”⁵¹

The Contracting Parties’ principal complaints about the dispute settlement procedure are the following: 1) long delays at each stage of the process result in inefficient resolutions; 2) defendant countries can too easily obstruct the process; 3) the panel procedure is riddled with defects; and 4) the ability to ensure compliance with recommendations is non-existent, rendering the process ineffective.⁵² Even in the U.S. Dairy Quotas case, the one instance where the Contracting Parties authorized retaliation, enforcement was not achieved: the United States did not change its import quotas.⁵³

Complaints that specifically target the panel process focus on the delays that occur in appointing panel members, setting the terms of reference,⁵⁴ investigating the case, and issuing and adopting panel reports.⁵⁵ Because GATT relies on consensus decisionmaking, defendant parties participate in the resolution of the dispute and are thus able to prolong virtually every phase of the panel process.⁵⁶ There is also concern that panel decisions are politically motivated, since panels are composed of “preferably governmental” individuals.⁵⁷ Although panelists are to be neutral when performing investigations and making decisions,⁵⁸ in practice their positions at least indirectly reflect their governments’ interests. Often underlying these complaints is the belief that GATT should not rely on consensus decisionmaking, but should instead utilize third party adjudication procedures.⁵⁹ Proponents of the consensus approach, on the other hand, argue that consensus decisionmaking reduces the opportunity for politicization of the dispute, preserves national sovereignty,⁶⁰ and promotes voluntary settlement, which may shorten or actually eliminate the panel process.⁶¹

⁵¹ GENERAL AGREEMENT ON TARIFFS AND TRADE, GATT ACTIVITIES 1986, 23 (1987) at 15 [hereinafter Punta del Este Ministerial Declaration].

⁵² E.g., *ITC Dispute Settlement Study*, *supra* note 13 at 71-72; Davey, *supra* note 19, at 65.

⁵³ *U.S. v. Netherlands*, *supra* note 40; Davey, *supra* note 19, at 90 n.162.

⁵⁴ Terms of Reference “set the question(s) that the panel is to address and the substantive provisions to be considered, in addition to any other necessary points concerning the procedures or timeframe to be used.” They must “be accepted by the disputants before the panel can begin its work,” creating an opportunity for delay. *ITC Dispute Settlement Study*, *supra* note 13, at 77.

⁵⁵ Davey, *supra* note 19, at 84.

⁵⁶ *ITC Dispute Settlement Study*, *supra* note 13, at xii. For example, until recently, South Korea consistently exercised its right to veto panel findings. N.Y. Times, Nov. 13, 1989, at D1, col. 6.

⁵⁷ Understanding, *supra* note 23, at ¶ 11.

⁵⁸ Annex, *supra* note 16, at ¶ 6(iii).

⁵⁹ See *infra* notes 137-47 and accompanying text.

⁶⁰ *ITC Dispute Settlement Study*, *supra* note 13, at 69.

⁶¹ Ehrenhaft, *supra* note 2, at 148.

The United States provides an example of a major trading nation's interference and noncompliance with GATT dispute procedures. In 1972, the EEC and Canada challenged the United States' Domestic International Sales Corporations (DISC) legislation, which permitted indefinite deferrals of taxes on export earnings. First, the parties delayed the panel process for two and a half years because they could not agree on the panelists.⁶² A panel finally issued four reports in 1977, concluding that the DISC legislation violated the General Agreement.⁶³ The Contracting Parties' 1981 decision based on the panel reports "effectively required the United States to repeal the law."⁶⁴ Only in 1985, thirteen years after the complaint was filed, did the United States accept the panel's finding. When Congress did abolish the DISC legislation, however, it replaced it with the very similar Foreign Sales Corporations ("FSC") legislation.⁶⁵ GATT's dispute settlement mechanism thus was not only time-consuming, but also ineffective.⁶⁶

The perception that the dispute settlement system cannot efficiently, effectively or equitably handle trade disputes causes GATT member countries to seek alternative solutions often outside, and inconsistent with the aims of, GATT.⁶⁷ The longer an injured party must wait to have a dispute resolved, the worse the damage incurred as a result of the trade imbalance.⁶⁸ Because under GATT the offending nation can continue its nonconforming trade practice until the Contracting Parties adopt the panel's recommendation and, even then, the

⁶² Comment, *The GATT Dispute Settlement Procedure in the 1980s: Where Do We Go from Here?*, 5 DICK. J. INT'L L. 82, 91 (1986).

⁶³ *Id.* at 92.

⁶⁴ *Id.*; GATT, Tax Legislation, BISD, *supra* note 1, at 114 (28th Supp. 1982).

⁶⁵ Ehrenhaft, *supra* note 2, at 148. See also GATT, *U.S. Imports of Sugar from Nicaragua*, BISD 4/67; Davey, *supra* note 19, at 90 n.162 (in 1985, United States ignored adverse panel decision concerning U.S. restrictions on sugar imports from Nicaragua).

⁶⁶ With an eye to practical realities, the United States in November, 1989 moved to conform to several GATT rulings. By complying with the recommendations of the Contracting Parties, the United States hoped to establish binding rules that would be advantageous to the U.S. in the future, when it anticipates being a plaintiff, instead of a defendant, in GATT disputes. The United States desires to have a "stronger GATT to take [the U.S.] side in future disputes." N.Y. Times, Nov. 13, 1989, at D1, col. 6.

⁶⁷ In December, 1988 the United States announced the imposition of 100% import duties, effective January 1, 1989, on various agricultural products imported from the EEC in response to the EEC import ban on U.S. meat from hormone-fed cattle. N.Y. Times, Dec. 29, 1988 at D12, col. 4. The U.S. claims that the EEC blocked U.S. attempts to resolve the narrow issue of whether the hormones cause health hazards in humans through the GATT dispute settlement process. The EEC wants discussion of the dispute to include economic, scientific and consumer arguments, in addition to the narrow scientific issue. *Id.*

⁶⁸ Note, *supra* note 49, at 102-03.

guilty nation does not always forsake its practices,⁶⁹ injured parties prefer to impose self-styled trade restrictions, so that their own injury will be minimized and punishment of the offending parties assured.⁷⁰

These occurrences of procedural noncompliance instigated the universal desire of the contracting parties to modify GATT's dispute settlement mechanism. Each instance of noncompliance fosters more uncertainty in and further threatens the credibility of the overall system,⁷¹ leading to further circumvention of the procedures.⁷²

2.3. *Recent Solutions*

One of the chief aims of the Uruguay Round is to strengthen GATT's dispute settlement procedure. Although many participants believe the system cannot be strengthened without first eliminating the ambiguity of the underlying rules in the General Agreement, there is consensus that procedural modifications would bring some improvement. The debate concerns the scale and direction of those modifications. The Punta del Este Ministerial Declaration, which launched the Uruguay Round, guides the negotiations:

In order to ensure prompt and effective resolution of disputes to the benefit of all contracting parties, negotiations shall aim to improve and strengthen the rules and the procedures of the dispute settlement process, while recognizing the contribution that would be made by more effective and enforceable GATT rules and disciplines. Negotiations shall include the development of adequate arrangements for overseeing and monitoring of the procedures that would facilitate compliance with adopted recommendations.⁷³

At the Uruguay Round midterm review meeting held in Montreal in December 1988, the Contracting Parties agreed to procedures designed to eliminate delays and facilitate the movement of disputes through the dispute resolution machinery. They established time limits

⁶⁹ *Id.* See also *ITC Dispute Settlement Study*, *supra* note 13, at 70.

⁷⁰ For example, the United States often refused to accept GATT rulings, instituting unilateral trade actions instead. *N.Y. Times*, Nov. 13, 1989, at D1, col. 6.

⁷¹ See *Progress Report* of Oct. 18, 1988, *supra* note 11, at 1 (the economic downturn of the 1980s created disillusionment with GATT's ability to prevent or discourage protectionist trade policies).

⁷² Procedures tend to become more compulsory when the parties see that they are "helpful in resolving conflicting interests in an orderly and peaceful manner." R. BALDWIN, *BEYOND THE TOKYO ROUND NEGOTIATIONS* 19 (1979); see also Hoellering, *Alternative Dispute Resolution and International Trade*, 14 *N.Y.U. REV. L. & SOC. CHANGE* 785, 786 (1986).

⁷³ Punta del Este Ministerial Declaration, *supra* note 51, at 23.

for the consultation and conciliation phases, and for each step in the panel process.⁷⁴ They streamlined the procedure by encouraging conciliation, good offices and mediation; allowing for optional arbitration; establishing a standard mandate for every panel; and permitting the Director-General to draw from a standing roster of panelists to quicken panel selection, if necessary.⁷⁵ Both governmental and non-governmental individuals will now be able to serve as panelists, which should reduce the fear of political partiality.⁷⁶

3. TRADE IN SERVICES

Trade in services encompasses such fields as tourism, transportation, telecommunications, construction, financial services and professional services.⁷⁷ As of 1988, services trade accounted for approximately one-fifth of the estimated \$2.8 trillion volume of international trade,⁷⁸ and provided a major source of employment and revenue to industrialized countries.⁷⁹ According to a GATT report, trade in services grew faster than merchandise trade in the 1980's.⁸⁰ Yet, despite the economic and political significance of services trade to most nations and the interrelationship between goods and services,⁸¹ no multilateral regime exists to regulate it on an international scale.⁸² The General Agreement "was designed particularly to apply to goods and was not intended to cover services."⁸³ Consequently, contracting parties can impose barriers to

⁷⁴ See generally *Multilateral Trade Negotiations*, *supra* note 14. For a more detailed analysis, see *infra* notes 168-187 and accompanying text.

⁷⁵ OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, URUGUAY ROUND PROGRESS REPORT (Dec. 14, 1988) 17-18 [hereinafter URUGUAY ROUND PROGRESS REPORT of Dec. 14, 1988].

⁷⁶ *Multilateral Trade Negotiations*, *supra* note 14, at 27.

⁷⁷ Krommenacker, *Trade-Related Services and GATT*, 13 J. OF WORLD TRADE L. 510, 511 (1979).

⁷⁸ GATT estimated that the international volume of services trade reached \$560 billion in 1988. N.Y. Times, Sept. 19, 1989, at D10, col. 6; *Putting Services on the Table: The New GATT Round*, XXIII STAN. J. OF INT'L L. 13. The exact volume is hard to measure. For example, the United States officially had \$134 billion in nonmerchandise exports in 1985, of which \$90 billion was simply income on U.S. assets abroad. Levinson, *Unfettering Trade in Services*, ACROSS THE BOARD, Apr. 1987, at 24, 26.

⁷⁹ R. BALDWIN, *supra* note 72, at 27. As of 1987, it was estimated that 75% of the United States workforce and 50% of the United States gross national product was dependent on the service sector. These figures understate the role of services in the U.S. economy, however, because the value of many manufactured products are due to services such as transport, design and marketing. Levinson, *supra* note 78, at 26.

⁸⁰ N.Y. Times, Sept. 19, 1989, at D10, col. 6.

⁸¹ See Krommenacker, *supra* note 77, at 510.

⁸² Rivers, *supra* note 78.

⁸³ J. JACKSON, *supra* note 2, at 529. The one exception is Article VI, which applies to cinematographic films. GATT art. VI; Bravender-Coyle, *International*

services trade without violating the General Agreement. These barriers unavoidably affect free trade in goods.⁸⁴ For example, transportation and insurance are vital to trade in goods, so any discrimination in those service sectors necessarily affects such trade.⁸⁵ Proponents of trade in services negotiations warn that the viability of GATT depends on its ability to recognize the importance of the services trade and to develop a framework of rules that will foster a stable international environment for such trade.⁸⁶

If the Contracting Parties cannot agree on a trade in services code, a large portion of international trade will continue to be unregulated and open to protectionist measures. Bilateral and regional agreements, which necessarily discriminate against non-party countries, will fill the gap; these accords will be outside the jurisdiction and supervision of GATT.⁸⁷ Further, to protect and promote growth of their service industries, countries might develop unilateral measures inconsistent with GATT's overall objective of "removing distortions to the international exchange of goods."⁸⁸ An agreement on international regulation of services trade is crucial if GATT is not to be rendered obsolete.⁸⁹

The Contracting Parties recognized the need to discuss trade in services as early as the 1950's⁹⁰ and more recently at the Tokyo Round.

Trade in Services and the GATT, 13 AUSTL. BUS. L. REV. 217, 221 (1985). The side agreements or "codes" developed during the Tokyo Round under GATT auspices also deal with services, although to a limited extent. For example, the Agreement on Government Procurement covers services that are incidental to the supply of goods covered by the agreement and which account for a cost less than the cost of the goods themselves. Agreement on Government Procurement, Apr. 11, 1979, T.I.A.S. No. 10,403, 18 I.L.M. 1052, at 1055 (entered into force 1/1/81).

⁸⁴ Bravender-Coyle, *supra* note 83, at 220.

⁸⁵ *Id.* at 219-20.

⁸⁶ See, e.g., Schott, *supra* note 11, at 198; Ministerial Declaration, Nov. 1982, GATT/1328, set out in BISD 29S/9 (1983); C. Yeutter, *supra* note 2, at 1 ("[T]he future of the international trading system hinges on the outcome of th[is] ministerial meeting [in Uruguay]").

⁸⁷ HANDBOOK, *supra* note 10, at 10. For example, the recently signed Canada-U.S. bilateral free trade agreement contains binding rules applicable to a broad range of trade in services. LAW & PRACTICE, *supra* note 2, Introduction, at 31. See also *ITC Dispute Settlement Study*, *supra* note 13, at 83.

⁸⁸ *ITC Dispute Settlement Study*, *supra* note 13, at vi.

⁸⁹ See Sauvant, *supra* note 12, at 18 ("GATT needs to adjust to today's economic realities; it must evolve, if it wishes to maintain its relevance."). At the Montreal midterm review meeting held December 5-9, 1988, the contracting parties agreed to a framework for negotiations on trade in services. The countries will strive to achieve transparency, national treatment and "effective market access." The types of services to be included were left to later negotiations. 5 Int'l Trade Rep. (BNA) No. 49 at 1619 (Dec. 14, 1988).

⁹⁰ Krommenacker, *supra* note 77, at 510. In 1953, the Contracting Parties instructed the Executive Secretary to prepare a report on the issues involved in discrimination in transport insurance which had been referred to the GATT by the U.N. Economic and Social Council. *Id.* at 511.

The Uruguay Round, however, represents the first multilateral forum at which they are addressing services in depth.⁹¹ The Uruguay Round Declaration on services is broad in its mandate:

Negotiations in this area shall aim to establish a multilateral framework of principles and rules for trade in services, including elaboration of possible disciplines for individual sectors, with a view to expansion of such trade under conditions of transparency and progressive liberalization and a means of promoting economic growth of all trading partners and the development of developing countries. Such framework shall respect the policy objectives of national laws and regulations applying to services and shall take into account the work of relevant international organizations.⁹²

Negotiating an agreement to cover world trade in services now is far more complicated than was negotiating a goods agreement in 1947.⁹³ The nature and characteristics of the service trade are different from that of goods, and the political and economic situations of the contracting parties have changed dramatically in the past four decades. Understanding the problems involved in negotiating a services agreement is critical to anticipating the composition of a final agreement, including its dispute settlement provision.

The disagreement among the Contracting Parties regarding whether to have a services agreement under GATT indicates the basic lack of common support behind an accord; negotiations over specific provisions promise to be even more arduous. There are strong differences even among the code's proponents as to the desired coverage and substance of the agreement's rules.⁹⁴

The United States is the most vociferous proponent of a global services agreement, followed by other developed nations such as Japan and the European Economic Community. The "Group of Ten,"⁹⁵ which represents lesser developed countries (LDCs), is the most vehe-

⁹¹ Schott, *supra* note 11, at 208. Services trade was not discussed during the Tokyo Round because of the lack of detailed knowledge about the problems involved and the complexity of the other issues on the agenda. BALDWIN, *supra* note 72, at 29. The Tokyo Round did result, however, in several codes which augment the General Agreement, some of which cover services trade to a limited extent. See *infra* note 127 and accompanying text.

⁹² Punta del Este Ministerial Declaration, *supra* note 51, Part II, at 26.

⁹³ See *infra* notes 135-36 and accompanying text.

⁹⁴ HANDBOOK, *supra* note 10, at 10.

⁹⁵ The "Group of Ten" consists of Brazil, India, Yugoslavia, Nigeria, Tanzania, Cuba, Nicaragua, Peru, Argentina and Egypt. Veale, Spiegelman & Ronkainen, *Trade in Services: The U.S. Position*, 11 FLETCHER 21, 21 (1987) [hereinafter Veale].

ment opponent. The Group of Ten initially fought the inclusion of services in the Uruguay Round talks.⁹⁶ It feared that negotiations over services trade would 1) inhibit the growth of the LDCs' infant and unborn service industries;⁹⁷ 2) allow developed nations to link liberalization of services trade with further liberalization of goods trade;⁹⁸ 3) deflect attention and resources from efforts to liberalize trade in goods;⁹⁹ and 4) "impinge on national security and sovereignty."¹⁰⁰ They are also generally uncertain as to where their long-term interests in services trade lie.¹⁰¹ As part of a compromise reached at Punta del Este between the opponents and proponents of services trade liberalization, service trade issues are officially being negotiated outside of GATT, separate from other GATT issues, but remain under the overall GATT negotiating committee established for the Uruguay Round.¹⁰² Although this "separation may be more form than substance, . . . [it reflects] the sharp divisions among the [Contracting Parties]."¹⁰³ The problem with this compromise is that the opposing parties can choose not to incorporate the agreement into GATT after negotiations end in 1990.¹⁰⁴

While one easily can identify and quantify trade in goods, it is hard to identify the nature and magnitude of the services trade, creating an inherent difficulty in formulating a workable services agreement.¹⁰⁵ For example, the United States government classifies services trade into

⁹⁶ LDCs having more developed service sectors, such as Hong Kong and Singapore, however, favor negotiations. Schott, *supra* note 11, at 211.

⁹⁷ The "infant industry" argument is based on the belief that LDCs' nascent services sectors could not survive competition from the industrialized countries. Veale, *supra* note 95, at 23. The trade barriers imposed by LDCs on their service sectors are integrally linked to their policies for economic development, eclipsing any concern for their restrictive impact on international trade in services. Schott, *supra* note 95, at 212.

⁹⁸ The economies of LDCs more directly depend on the export of goods than do the economies of developed nations. *In Defence of Open Multilateral Trade*, *supra* note 10, at 19. Further liberalization of foreign markets for their goods is one of the LDCs' chief goals for the Uruguay Round. HANDBOOK, *supra* note 10, at 10.

⁹⁹ HANDBOOK, *supra* note 10, at 10.

¹⁰⁰ Kalil, *The Uruguay Round: An Interview with Ambassador Michael B. Smith*, 11 FLETCHER F. 13, 14 (1987).

¹⁰¹ HANDBOOK, *supra* note 10, at 10.

¹⁰² Rivers, *supra* note 78, at 19-20. The negotiation on services is being performed on the ministerial level and technically falls outside of the GATT structure. See Recent Developments, *supra* note 2, at 204. GATT procedures and practices will apply to the services negotiations, however, and both the Group on Negotiations on Goods and the Group on Negotiations on Services will report to the Trade Negotiations Committee, which has overall responsibility for the negotiations. See Punta del Este Ministerial Declaration, *supra* note 51, at 26-27.

¹⁰³ HANDBOOK, *supra* note 10, at 10.

¹⁰⁴ See Aho, *supra* note 4, at 2.

¹⁰⁵ Note, *supra* note 40, at 106, n.175.

forty sectors, compared to the ten thousand categories available for trade in goods.¹⁰⁶ The measurement problem lies in the numerous definitions and heterogeneous nature of services.¹⁰⁷ The frequently used national accounting definition characterizes services as "all output not derived from the goods-producing sectors."¹⁰⁸ The United States Trade & Tariff Act of 1984 just as obliquely defines services trade as economic outputs which are not tangible goods or structures.¹⁰⁹ It will be very difficult for negotiators to fashion an agreement that contemplates all aspects of the disparate services trade. As a result, the initial parameters of the agreement likely will be imperfect.¹¹⁰

Even where available, data on the magnitude of the services trade is neither precise nor very comprehensive.¹¹¹ Services trade is often under-reported to government agencies for various reasons, such as tax avoidance.¹¹² International comparison and analysis of the data is difficult because every government and international organization measures output differently.¹¹³ While a "general feel" for the magnitude of the services trade is sufficient for deliberations on non-tariff rules and on codes of governmental conduct, more specific data is needed for both tariff negotiations and for proper classification schemes.¹¹⁴

The technological sophistication of service markets also makes identification and data collection difficult. Unlike goods transactions, many services transactions do not involve the physical crossing of borders, but instead are carried by telephone lines and satellites.¹¹⁵ Regulating international trade in services, therefore, will not be as simple as regulating international trade in goods because trade in services tends to be less "visible." Further, rapid technological advancement reduces the time between development and introduction of new generations of services. Rules governing services trade must therefore be adaptable to future markets, a difficult task to accomplish.¹¹⁶

Another significant problem in designing a trade in services agreement is the difficulty in recognizing the barriers to services trade and in determining which ones are impermissible. Because services are sup-

¹⁰⁶ Veale, *supra* note 95, at 24.

¹⁰⁷ *Id.*

¹⁰⁸ Note, *supra* note 10, at 377.

¹⁰⁹ Veale, *supra* note 95, at 24. Yet another commentator defines services as generally those items which are "non-storable." HANDBOOK, *supra* note 10, at 208.

¹¹⁰ See Levinson, *supra* note 78, at 28-30.

¹¹¹ Schott, *supra* note 11, at 197.

¹¹² *Id.*

¹¹³ *Id.* See also Note, *supra* note 10, at 374.

¹¹⁴ See Schott, *supra* note 11, at 198.

¹¹⁵ Aho, *supra* note 4, at 5, 8.

¹¹⁶ *Id.*

plied through a wider variety of means than are goods, more barriers exist to trade in services than to trade in goods. Unfortunately, these barriers tend to be less apparent than the tariff and quota barriers associated with goods trade. Service barriers are the product of more subtle administrative policies,¹¹⁷ and thus they tend to be of the non-tariff form. The obstacles to recognizing barriers to services trade will make it difficult to fashion an initial agreement that will eliminate all, or even many, existing barriers.

Finally, sanctions and barriers in the services trade are very much issues of national sovereignty.¹¹⁸ For example, a government may establish a certain size shipping fleet for national defense purposes or a national airline for prestige purposes.¹¹⁹ Banking operations are actively regulated not only for prudential reasons, but also as instruments of monetary and economic policy.¹²⁰ LDC's, in fact, view services as central to national development.¹²¹ The contracting parties will be subject to constant domestic political pressure as a result of the importance of service industries to national economic vitality.¹²² It is very likely that governments will choose to violate provisions of a services agreement and ignore the disciplinary recommendations of the Contracting Parties in favor of short-run national policy and domestic political favor.¹²³ Trade in services is much more vulnerable than is trade in goods to national policies that are inconsistent with the efficient allocation of international resources.

Given these difficulties, the initial trade in services agreement necessarily will be both over- and under-inclusive, and modifications will be necessary. The modifications would be made through further negotiations and/or incrementally through resolutions of disputes. The dispute mechanism must therefore be flexible enough to meet unforeseen

¹¹⁷ Note, *supra* note 10, at 374, 383. "Transparency" means identifiable, visible and regularly administered procedures. *Id.* at 383 n.78. Typical barriers include: restrictions on right to establishment; discriminatory taxation and capital requirements; restrictions on gaining professional accreditation; denial of visas; mandatory full or partial local ownership of service firms; and discriminatory licensing regulations and fees. *Id.* at 371-72 n.3; Schott, *supra* note 11, at 196, 207.

¹¹⁸ See *Record of Multilateral Trade Negotiations: The Uruguay Round, Trade Negotiations Committee Meeting at the Ministerial Level* [hereinafter *Ministerial Level*], Trade Negotiations Committee Doc. MTN.TNC/7 (MIN) at 41, 42 (Dec. 9, 1988).

¹¹⁹ R. BALDWIN, *supra* note 72, at 29.

¹²⁰ Schott, *supra* note 11, at 202; see also N.Y. Times, Sept. 25, 1989, at D3, col. 1. Countries often implement policies in a way that discriminates against foreign banks and lessens competition in the financial services sector. Schott, *supra* note 11, at 22.

¹²¹ Sauvart, *supra* note 12, at 16.

¹²² See Levinson, *supra* note 78, at 24. See also *infra* notes 157-59 and accompanying text.

¹²³ See Note, *supra* note 40, at 93.

difficulties and to allow for continual shaping of the international agreement.¹²⁴ It must also be efficient; any delay in resolution of a dispute will render the settlement ineffective.

4. DISPUTE SETTLEMENT PROCEDURE FOR A TRADE IN SERVICES AGREEMENT

While the key to successful dispute resolution lies primarily in having an agreement that possesses clear substantive rules, sound dispute resolution procedures promote adherence to those rules.¹²⁵ An effective dispute settlement mechanism is therefore necessary for any trade in services agreement. The question is whether GATT rules should be extended directly to such an agreement¹²⁶ or whether the new agreement should provide for its own dispute procedures. Independent procedures would likely be modeled after the General Agreement, since the Agreement provides a useful framework for governmental trade disputes. The dispute rules also will have to address the unique problems of a service code.¹²⁷ In answering this question, it is incumbent upon the negotiators to consider the special nature of the services trade, the likely structure of the services agreement, and for the inadequacies of GATT's current procedures.¹²⁸

It has already been suggested that trade in goods differs from trade in services so that simply applying current GATT dispute settlement procedures without analysis to a services agreement would be inappropriate.¹²⁹ It would also be inappropriate simply to use the dispute set-

¹²⁴ See *Ministerial Level*, *supra* note 118, at 41.

¹²⁵ R. BALDWIN, *supra* note 72, at 18; J. JACKSON, *supra* note 2, at 788 ("In the long run, it may well be the *machinery* that is most important, i.e., the procedures, rather than the existence of any one or another specific rule of trade conduct.") If one party believes that the other parties will comply with the dispute settlement mechanism and that the mechanism is fair, it will itself comply with the agreement. R. HUDEC, *supra* note 2, at 270.

¹²⁶ R. KROMMENACKER, *WORLD-TRADED SERVICES: THE CHALLENGE FOR THE EIGHTIES* ¶ 7.5.2.2 (1985). Incorporating service disputes under the current procedures, however, might overburden the already ineffective system. Veale, *supra* note 95, at 29.

¹²⁷ Creating a separate dispute settlement mechanism for a code created under GATT auspices is not a novel idea; the major Tokyo Round codes provide for their own dispute procedures. See, e.g., Agreement on Government Procurement, *supra* note 83; Agreement on Technical Barriers to Trade, BISD 26S/8. The provisions in these codes generally follow GATT procedures. The main differences include stricter time limits for completion of certain stages of the process and an unqualified right to have a panel. See, e.g., Agreement on Technical Barriers to Trade, art. 14; Davey, *supra* note 19, at 60. Some critics have complained that this division of procedures is unnecessarily complex and costly. Note, *supra* note 10, at 407. For a thorough analysis of the procedures adopted, see Hudec, *supra* note 30, at 174-77.

¹²⁸ Note, *supra* note 10, at 408-09.

¹²⁹ See *supra* notes 105-24 and accompanying text. Current procedures include

tlement system that was in effect when the General Agreement was new, a system generally thought of as highly successful, based on the rationale that the services agreement is also new.¹³⁰ For the reasons outlined below, the same system would probably not be successful during the early years of the services agreement.¹³¹

To be certain, some analogies can be drawn between the General Agreement of 1947 and the proposed services code. Like the contemplated services agreement, the General Agreement was new, untested and incomplete. It contained fairly rigorous legal rules and operated in a highly uncertain political environment.¹³² The tension between uncertain politics and strict legal rules was resolved by developing the flexible approach to dispute settlement that is currently used,¹³³ and by giving the rules provisional, instead of formal, legal status.¹³⁴ The circumstances surrounding the creation of the two agreements are critically different in several key respects, however. The power relationships of the contracting parties have changed over the past four decades,¹³⁵ trade relations are more complicated, services trade is more complex than goods trade, and there does not exist a community interest in, or a strong consensus behind, the creation of a services agreement.¹³⁶ Succinctly stated, the services agreement will be negotiated in

the modifications agreed to in Montreal. The agreement will not be formally adopted until April, when the midterm review will resume to achieve an agreement on worldwide agricultural trade reform. Until then, the agreement on dispute procedures is frozen. 5 Int'l Trade Rep. (BNA) 1638 (Dec. 21, 1988).

¹³⁰ J. JACKSON, *supra* note 2; see also *supra* note 46 and accompanying text.

¹³¹ See Davey, *supra* note 19, at 78.

¹³² It is likely that the Contracting Parties will adopt rigorous rules, such as MFN treatment, simply because that is the structure to which they have become accustomed in dealing with multinational trade. Further, vague rules and generalizations will not be able to regulate services trade effectively.

¹³³ See R. HUDEC, *supra* note 2, at 17, 270.

¹³⁴ R. HUDEC, ADJUDICATION OF INTERNATIONAL TRADE DISPUTES 29, 53 (1978).

¹³⁵ The Contracting Parties of GATT were small in number and a relatively homogenous group from 1947-58. See Davey, *supra* note 19, at 62. In 1947, GATT leadership consisted of the United States on one side and a group of smaller, relatively equal European nations on the other. With the formation of the EEC, the United States lost its monopolization of the power base. R. HUDEC, *supra* note 2, at 264-65. The addition of Japan as a powerful contracting party added a different perspective to GATT, as did the increase in the number of LDC members and their formation of a bloc commanding equal attention, if not equal power, from the developed nations. *Id.* at 193.

¹³⁶ Cf. R. HUDEC, *supra* note 2, at 261 (tracing the historical demise of a consensus among contracting parties); O. LONG, *supra* note 3, at 88. From 1948-58, when the GATT dispute settlement system functioned well, the General Agreement had only recently been signed and there was a general consensus on how it should be interpreted. Many government officials dealing with GATT had been involved in GATT's creation and probably had a personal interest in its success. See HANDBOOK, *supra* note 10, at

a world devoid of the factors that contributed to the early success of GATT's dispute settlement system.

When selecting a dispute settlement procedure, it is necessary to determine which philosophical approach is the most appropriate for the anticipated agreement. Dispute settlement procedures "can never be considered in isolation from the substantive rules to which the procedures [will] apply."¹³⁷ There are two conflicting schools of thought on how GATT and other multilateral trade agreements should approach dispute settlement: one school favors a legalist or rule-oriented adjudicatory approach,¹³⁸ while the other advocates a consensus approach that encourages negotiated settlements.¹³⁹ GATT's current quasi-judicial method contains a mixture of both approaches, but is generally thought to be consensus-based.¹⁴⁰ The Understanding, the Annex, the 1982 Ministerial Declaration, and the new Montreal agreement emphasize negotiation over adjudication; they all state that voluntary settlement remains the most satisfactory form of dispute resolution.¹⁴¹

Briefly stated, legalists advocate third party adjudication in which written rules are applied objectively to disputed cases.¹⁴² The rules are highly detailed, contemplating as much as possible every potential dispute, and constitute formal legal obligations.¹⁴³ This approach is most often urged by countries whose domestic justice systems are highly adjudicatory, such as the United States,¹⁴⁴ and by the LDCs. "Anti-legalists" or "pragmatists," while admitting that rules may provide valua-

¹³⁷ Hudec, *supra* note 30, at 183.

¹³⁸ See, e.g., Jackson, *supra* note 46, at 1. See generally K. DAM, *supra* note 2, at 351-75. The approach is also referred to as "juridical."

¹³⁹ See, e.g., O. LONG, *supra* note 3; Phan van Phi, *A European View of the GATT*, 14 INT'L BUS. LAW. 150, 151 (1986); Ehrenhaft, *supra* note 2, at 148. The consensus approach is also called "pragmatic" and "antilegalistic."

¹⁴⁰ See LEUTWILER REPORT, *supra* note 2, at 129. For example, the detailed procedural rules during the panel process calling for impartiality, time limits and the exchange of written documents resemble a judicial system. Petersmann, *supra* note 29, at 469-70. On the other hand, the consultation and conciliation requirements and the panel's role in encouraging settlement exemplify GATT's antilegalist approach to dispute resolution. Mounteer, *The General Agreement on Tariffs and Trade (GATT) and the Law of the Sea (LOS) Convention: A Critical Comparison of Arbitration Provisions*, 21 INT'L LAW. 989, 1006 (1987). As Professor Dam has noted, "legalism" dominated the drafting of the General Agreement and some of the amendments, but "pragmatism" has governed its interpretation and administration. K. DAM, *supra* note 2, at 4. GATT also has been characterized as having been more legalistic in its approach to dispute settlement in its early years, and more antilegalistic in the years before the Tokyo Round. Hudec, *supra* note 30, at 151. GATT art. XXIII mandates neither approach.

¹⁴¹ Hudec, *supra* note 30, at 177.

¹⁴² See, *id.*

¹⁴³ See R. HUDEC, *supra* note 134, at 52; K. DAM, *supra* note 2, at 4.

¹⁴⁴ See *ITC Dispute Settlement Study*, *supra* note 13, at 68.

ble guidelines, favor informal consultation procedures in which conflicts are resolved through negotiation and mutual agreement. Rules should be avoided when possible, and adjudication should be a last resort.¹⁴⁵ The rules are not legally binding. Proponents of this school, such as Japan and the EEC, note the complexity of the political, social and economic forces involved in defining governmental trade policy, as well as the futility of international rules in the face of such domestic forces.¹⁴⁶ Further, if the rules had binding force, the parties would agree only to the most trivial rules: rules so trivial that enforcement would not even be necessary.¹⁴⁷

Although the General Agreement might be improved by strengthening the procedural rigor of its dispute settlement procedures, a services agreement would benefit by adhering basically to the quasi-judicial dispute resolution procedures currently used by GATT. The rules should be designed to encourage a negotiated approach to dispute settlement, using legalistic methods only to facilitate effective conflict resolution.

The services agreement certainly will need the stability and predictability offered by a legalistic approach. Stability and predictability help promote the common goals of an international agreement and enable nations to rely upon the legal rules of an agreement as being representative of what to expect from other countries.¹⁴⁸ The flexibility and pragmatism offered by an anti-legalist approach, however, are more crucial for the services code because it is unlikely that the agreement will enjoy the full support of its signatories.¹⁴⁹ Rigorous procedures which force legal rulings where there is no consensus backing the substantive rules will "lead trade disputes into unproductive channels and could ultimately weaken the legal structure itself" through a loss of confidence in the system.¹⁵⁰ In the absence of consensus and pressure to conform, governments will tend to disregard international rules that conflict with domestic policies.¹⁵¹ Where parties are not in consensus over the substantive rules of an agreement, compliance with the agree-

¹⁴⁵ See R. HUDEC, *supra* note 134, at 52; K. DAM, *supra* note 2, at 4.

¹⁴⁶ *Id.* See also *supra* notes 122-23 and accompanying text.

¹⁴⁷ See R. HUDEC, *supra* note 134, at 53.

¹⁴⁸ J. JACKSON, *supra* note 2, at 755-56.

¹⁴⁹ Flexibility and pragmatism are necessary for reaching a compromise between two conflicting interests when the normal legal processes are not useful and when it is preferable to avoid "legal technicalities." *Id.*

¹⁵⁰ R. HUDEC, *supra* note 2, at 270. See also Phan van Phi, *supra* note 139, at 152.

¹⁵¹ See R. HUDEC, *supra* note 2, at 17 (ITO Charter had no real chance of prevailing over stronger, conflicting domestic interests); see also O. LONG, *supra* note 3, at 20.

ment is best assured by using a flexible settlement approach involving negotiation and compromise.¹⁵²

Incorporating a flexible dispute settlement process into a services agreement also may be necessary to obtain the signatures of the anti-legalist countries.¹⁵³ Contracting parties that are dissatisfied with the dispute settlement procedure might refuse to approve the agreement or, once enacted, refuse to abide by the agreement's terms.

The anti-legalist approach also provides the flexibility needed to define new obligations of the services agreement through the dispute settlement process.¹⁵⁴ Because of the inherent difficulty in crafting a services agreement, many of its terms will be molded by the issues and disputes that arise during the agreement's early years. Although the dispute panels do not have authority under GATT to create new rules,¹⁵⁵ panels often create rules in practice which are adopted by the Contracting Parties as a matter of course. So far, no member country has objected to this practice. Permitting the results of third party adjudication to stand as new law, without the Contracting Parties at least having the option to reject the panel report, would be inconsistent with a trade agreement based on the principle of consensus.¹⁵⁶ Further, since "current" consensus constantly changes, a services agreement must allow for the flexibility needed to identify the consensus of the moment.

The use of an adjudicatory approach also is inappropriate because it would impinge upon the sovereignty of the contracting parties.¹⁵⁷ Where vital national interests such as defense are implicated, governments comply only with international rules and panel recommendations with which they agree. The importance of the service sector to the economies of many countries makes national policies regarding international exchange of services particularly vulnerable to internal economic and political pressures. Nations will disobey multilateral rules and ignore panel decisions if overwhelmed by such domestic pressures.¹⁵⁸ Thus, utilizing third party adjudication to resolve disputes likely will

¹⁵² O. LONG at 108. See also LEUTWILER REPORT, *supra* note 2, at 130.

¹⁵³ Cf. Berg, *Trade in Services: Toward a "Development Round" of GATT Negotiations Benefiting Both Developing and Industrialized States*, 28 HARV. INT'L L.J. 1, 30 (1987) (noting increasing power of "third world economic interests").

¹⁵⁴ See Davey, *supra* note 19, at 96-97. The approach is also valuable for decisions that are novel or unexpected. *Id.*

¹⁵⁵ Their authority extends only to interpreting existing rules. No panel or working party of GATT can extend or modify the rights and obligations of the parties. See Phan van Phi, *supra* note 139, at 151.

¹⁵⁶ See Hudec, *supra* note 30, at 196 ("[H]aving been cast in a less rigorous form, GATT rules must necessarily draw the major part of their authority from their consistency with the norms and values current in the GATT community.").

¹⁵⁷ R. BALDWIN, *supra* note 72, at 19.

¹⁵⁸ For an example, see R. Hudec, *supra* note 2, at 159, 161.

lead to a high rate of non-compliance among losing parties. Non-compliance will undermine the credibility of both the dispute settlement procedure and the services agreement. A consensus-based approach would provide the flexibility needed to resolve politically controversial disputes successfully.¹⁵⁹

A legalist approach to dispute resolution also can overburden a fragile agreement. By using a negotiation-based approach to dispute settlement, GATT has been able to weather successfully numerous strains and stresses on its agreement and organization over the past forty years. The Contracting Parties intentionally emphasized negotiation over third-party adjudication in recognition of the fragility of the GATT structure. For example, during the first decade of GATT's existence, the members "took care not to put too much stress on [the fragile GATT system] through overly aggressive use of the dispute settlement system."¹⁶⁰ At the Review Session of 1955, the members decided not to institute the panel process, which is now in effect, citing the excessive strain that formal establishment of judicial procedures would place on GATT.¹⁶¹ Likewise, during the tumultuous 1960's, when the contracting parties had substantive problems with GATT and were experiencing political pressure at home,¹⁶² the contracting parties settled disputes primarily through negotiation rather than through the panel process: GATT was probably too fragile to withstand the additional pressure of a more adjudicatory dispute procedure.¹⁶³ The heated debate over whether even to negotiate a multinational services trade agreement indicates the inevitable fragility of any final services agreement reached. An approach that allows for flexibility in administering the agreement's rules would better ensure the survival of such a code.

It should be noted that the legalist approach to dispute settlement has some merit in that it actually could facilitate negotiation processes. The availability of third-party adjudication might discourage parties from prolonging futile negotiations¹⁶⁴ or making spurious claims to jus-

¹⁵⁹ See Jackson, *supra* note 46, at 9; Davey, *supra* note 19, at 97. See also R. HUDEC, *supra* note 134, at 29; R. BALDWIN *supra* note 72, at 20.

¹⁶⁰ Davey, *supra* note 19, at 62.

¹⁶¹ Annex, *supra* note 16, at ¶ 1, n.2. The panel procedure was codified in 1979, when the system was thirty years old.

¹⁶² R. HUDEC, *supra* note 2, at 193, 195-97, 262. Triggered by the formation of the EEC and new competition from non-Western countries, the contracting parties no longer commanded a consensus about long-term goals. Additionally, some of the GATT rules were regarded as outdated and incomplete. For example, the General Agreement did not cover non-tariff barriers, which were as damaging to trade as tariff barriers. The parties thus tended to ignore the dispute mechanism in favor of reaching diplomatic solutions. Hudec, *supra* note 30, at 152.

¹⁶³ Davey, *supra* note 19, at 79. See also, *supra* note 47 and accompanying text.

¹⁶⁴ See Davey, *supra* note 19, at 69; R. HUDEC, *supra* note 134, at 28. Professor

tify violations.¹⁶⁵ In addition, "the existence of . . . adjudicative procedures makes negotiations over rule violations more likely to succeed" because binding rules provide reference points for the negotiators so that the negotiations remain focused.¹⁶⁶

Having argued that a trade in services agreement should take a primarily anti-legalist approach to dispute settlement, the question remains as to which of the GATT dispute procedures, if any, the drafters should incorporate into a services code. These procedures include the revisions made at the Montreal midterm review meeting.¹⁶⁷

The first step in the settlement process, bilateral consultation, clearly should be adopted. Many disputes are resolved during this stage; even the legalists favor the process. Any agreement reached through bilateral consultation necessarily will be satisfactory to the parties, resulting in a higher probability of compliance. At the Montreal midterm review meeting, the delegates imposed time limits upon this phase. The Montreal agreement requires that "unless otherwise mutually agreed, [a party must] reply to the [consultation] request within ten days after its receipt and shall enter into consultations in good faith within a period of no more than thirty days from the date of the request. . . ."¹⁶⁸ If the defendant party fails to comply with the time restraints, the "contracting party that requested the holding of consultations may proceed directly to request the establishment of a panel or a working party."¹⁶⁹ Further, if consultations fail to settle the dispute within sixty days of the request for consultation, the complaining party may request establishment of a panel or working party.¹⁷⁰ Prior to the Montreal meeting, there was no set point after which a party could abandon consultations.¹⁷¹ The Understanding only encouraged parties to respond to requests for consultation "promptly" and to conclude dis-

Davey, an advocate of the legalist approach, claims that adjudication will not lead to the end of all attempts at negotiation because negotiation would still remain the only effective way to obtain compliance with the panel decision. Davey, *supra* note 19, at 69, n.74.

¹⁶⁵ R. HUDEC, *supra* note 134, at 28.

¹⁶⁶ Davey, *supra* note 19, at 77, n.101 (citing R. HUDEC, *supra* note 134 at 28-29). See also J. JACKSON, *supra* note 2, at 766-67.

¹⁶⁷ The new provisions are being applied on a trial basis until the end of the Uruguay Round. Negotiations on further modifications will continue through 1990, and a permanent decision on the provisions will be made before the end of the Round. *Ministerial Level*, *supra* note 118, at 26.

¹⁶⁸ *Multilateral Trade Negotiations*, *supra* note 14, at 25. In cases involving urgent matters, such as perishable goods, consultations must begin within ten days. *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ See *Understanding*, *supra* note 23, at ¶ 6.

cussions "expeditiously."¹⁷² The new time limits add a degree of procedural rigor that is needed for the services agreement to insure that disputes are not ignored or stone-walled by powerful countries.

The Montreal delegates further emphasized their preference for negotiated solutions by instituting a mediation option and by strengthening the conciliation and good offices procedures. These procedures are optional and available at any point in the dispute settlement process, even after the establishment of a panel or the issuance of recommendations.¹⁷³ Utilizing mediation or conciliation procedures does not preclude a complaining party from later requesting a panel if mediation or conciliation proves unsatisfactory.¹⁷⁴ The dispute procedure for trade in services should also allow for mediation, conciliation and good offices. These procedures encourage mutually satisfactory settlements. Even when the parties do not reach voluntary settlements, mediation, conciliation and good offices are helpful in narrowing the issues in complex disputes.¹⁷⁵ As a result, panels are able to decide fewer issues and can submit recommendations more quickly.

The disadvantage of the mediation proposal, both in GATT and in the new services code, is that it could present a further source of delay in the dispute resolution process.¹⁷⁶ The Montreal agreement is silent as to the rules and structure of the procedure, giving the disputants maximum flexibility in designing the rules for their particular dispute.¹⁷⁷ While this flexibility encourages mutually acceptable solutions, it potentially subjects the mediation process to indefinite delay. The parties may disagree over every step in the process, despite their overall commitment to mediation. Highly structured procedures would discourage delay.

The Montreal delegates also added an arbitration option to the

¹⁷² *Id.* at ¶ 4.

¹⁷³ *Multilateral Trade Negotiations*, *supra* note 14, at 26. The text adopted in Montreal leaves the mediation procedures to the discretion of the particular disputants. Under the 1982 Ministerial Declaration, the parties were permitted to seek the good offices of a third party at any time after consultations failed. Ministerial Declaration of November 29, 1982, BISD 29S/9 at 14 (1983).

¹⁷⁴ *Multilateral Trade Negotiations*, *supra* note 14, at 26.

¹⁷⁵ See Hoellering, *supra* note 72, at 791. In general, the EEC, Japan and GATT officials, all advocates of the anti-legalist approach, prefer GATT to settle disputes internally, rather than cede power to outside agencies. Comment, *supra* note 62, at 98.

¹⁷⁶ Davey, *supra* note 19, at 106.

¹⁷⁷ It has been suggested that the Director-General of the GATT would be best suited to mediating disputes. See e.g., *id.*; Bliss, *GATT Dispute Settlement Reform in the Uruguay Round: Problems and Prospects*, 23 STAN. J. INT'L L. 31, 51 (1987) (summarizing the United States' proposals). Professor Jackson has proposed a detailed structure of mediation. See Jackson, *supra* note 46, at 15-16.

dispute resolution process as an alternative to the panel process. An advantage of arbitration is that the arbitral award is final and binding upon the disputants, without the approval of the Contracting Parties. Further, since the arbitration rules, like the mediation rules, deliberately were not set forth in the Montreal agreement, disputing parties have complete autonomy in fashioning the process. Conversely, the panel procedure is governed by formal rules. While the arbitration process theoretically could be handled either internally by GATT or externally by an independent international administering agency, such as the International Chamber of Commerce Court of Arbitration, disputants most likely will choose to have their controversy decided under GATT auspices.¹⁷⁸

It would be imprudent to incorporate an optional arbitration procedure into the services dispute mechanism. Although, under GATT, arbitration would be available only when the issues in dispute are clearly defined and both parties agree to arbitration,¹⁷⁹ it would be dangerous to allow one, independent party to render a binding interpretation of the new services trade rules, no matter how "clear" those issues may appear. Even a compromise of non-binding arbitration, in which the arbitrator's finding is not binding upon the parties but is admissible in future actions,¹⁸⁰ would not solve this problem. Experience in the international construction industry indicates that the threat of admissibility encourages parties to accept the arbitration award.¹⁸¹ The award thus becomes *de facto* binding. As stated earlier, compliance with the new agreement depends on the acceptability of its rules to the signatories. A consensus approach best insures that new interpretations are acceptable.

Although the panel process represents a more legalistic approach to dispute settlement, it should be included in the services dispute settlement mechanism. The Contracting Parties crafted the panel procedure over a period of many years in response to GATT's inability to handle trade disputes effectively.¹⁸² The member countries reaffirmed the utility of the procedure both at the Tokyo¹⁸³ and Montreal meetings. In Montreal, the members further modified the panel process in order to minimize delays that had plagued the system, recognizing that the aim of the panel process is to produce high quality reports in the shortest

¹⁷⁸ See Hoellering, *supra* note 72, at 789.

¹⁷⁹ *Multilateral Trade Negotiations*, *supra* note 14, at 26.

¹⁸⁰ Hoellering, *supra* note 72, at 794.

¹⁸¹ *Id.*

¹⁸² See Mounteer, *supra* note 140, at 1003-04.

¹⁸³ See Hudec, *supra* note 30, at 170.

time possible.¹⁸⁴ In addition, the Montreal negotiators set standard terms of reference¹⁸⁵ and expanded the roster of experts available to serve as panelists.¹⁸⁶ All of these modifications encourage a more efficient dispute resolution process.

Although this increased efficiency will heighten the legalism of the dispute settlement process and place additional burdens on the procedural structure, such changes are necessary to prevent the problems that plague the current dispute procedure. Delays in processing disputes have plagued GATT to such an extent that contracting parties currently hesitate to use the dispute settlement system altogether.¹⁸⁷ There is no reason to believe that disputants would not attempt to delay settlement proceedings or that other administrative problems would magically disappear under the services agreement. In fact, the underlying disagreement over the creation of a services code suggests that parties will employ dilatory tactics even more frequently. Because new services are introduced into world trade at an increasingly rapid rate, inordinate delays in dispute resolution will render decisions ineffective and encourage injured parties to fashion remedies outside the multilateral system.¹⁸⁸

Finally, the Contracting Parties will have to decide what legal status to accord panel decisions under the services agreement. Under GATT, the legal status of panel decisions is unclear: sometimes they

¹⁸⁴ *Multilateral Trade Negotiations*, *supra* note 14, at 29.

Under the Understanding, the emphasis was merely on "prompt" action. See e.g., Understanding, *supra* note 23, at ¶¶ 11-12. *Id.* at ¶ 20. Panels were encouraged, for example, to "deliver their findings without undue delay," but specific timeframes were not set.

The Montreal agreement establishes a deadline for decisions in response to a party's request for a panel; a twenty-day timeframe for the disputants' approval of the panelists; and a one-week deadline for the panel to establish an overall timetable that will remain in effect until the panel's first substantive meeting. *Multilateral Trade Negotiations*, *supra* note 14, at 26-29. A panel report should be submitted to the disputants within six months of when the panel originally convened. *Id.* at 29. In cases involving urgent matters such as perishable goods, the panels should aim to submit a report to the disputants within three months. In no event can the "report process" extend beyond nine months; historically, very few cases have required longer periods. *Id.*; Understanding, *supra* note 23, at ¶ 20, n.1. Finally, the entire panel process, from the request for a panel until the Contracting Parties act on the panel report, cannot exceed fifteen months unless the parties otherwise agree. *Multilateral Trade Negotiations*, *supra* note 14, at 30.

¹⁸⁵ See *supra* note 54.

¹⁸⁶ *Multilateral Trade Negotiations*, *supra* note 14, at 27.

¹⁸⁷ See *Uruguay Round Progress Report* of Dec. 14, 1988, *supra* note 75, at 17. But see Davey, *supra* note 19, at 84 (delay in processing disputes has not been a major problem since the Tokyo Round; the entire process usually does not take longer than eighteen months).

¹⁸⁸ See Jackson, *supra* note 46, at 7. See also Wash. Post, Dec. 29, 1988 at E10, *col. 1*.
Published by Penn Law: Legal Scholarship Repository, 2014

are given precedential status, but usually they are not.¹⁸⁹ Critics contend that this muddled status results in panels and members spending too much time dealing with issues previously resolved.¹⁹⁰ On one hand, requiring published reports of panel decisions and giving them precedential weight for future disputes would add to the juridical nature of the process. On the other, established precedent would aid disputants by enabling them to base their negotiating positions on reasoned predictions about the outcome of a case if it were to proceed to adjudication.¹⁹¹ Precedent would also aid in rounding out the less than comprehensive rules of a new services code, adding structure to the agreement. Functionally, panel findings would provide and interpret rules for future disputes. Additionally, case precedent is less binding than formal rules. While future panels can overrule decisions that later become inappropriate, only the Contracting Parties acting in consensus have the authority to amend rules.

Overall, the provisions developed in Montreal reaffirm the Contracting Parties' reliance on negotiation, and they generally could be incorporated into a services dispute mechanism. Voluntary settlement and consensus appropriately remain the touchstones of the dispute resolution process.¹⁹² Despite firmer time deadlines, the disputing parties retain the flexibility to prolong the consultation process: panels are not mandatory but, if used, the participants or the panel can extend the new time restraints on the panel process.¹⁹³ The Montreal modifications generally focus on minimizing procedural delays. Incorporating the panel procedure, time deadlines and use of case precedent into an otherwise consensus-based approach to dispute resolution would provide the legalism necessary for the efficient functioning of the dispute process. Additional adjudicative techniques and rules would overburden the dispute process and prevent the negotiated solutions essential to the survival of the trade in services agreement.

5. CONCLUSION

The highly charged environment surrounding the creation of a services trade agreement, the unique characteristics of services trade,

¹⁸⁹ Davey, *supra* note 19, at 105 & n.221.

¹⁹⁰ ITC *Dispute Settlement Study*, *supra* note 13, at 73. Detailed reports of GATT disputes are not always published, and the "Understandings" that are sometimes issued lack useful interpretive language. *Id.*

¹⁹¹ Jackson, *supra* note 46, at 9. Less powerful nations do not want detailed reports to be accorded precedential weight, especially in complex cases.

¹⁹² See *Multilateral Trade Negotiations*, *supra* note 14, at 25-26.

¹⁹³ See generally *id.*

and the problems of the existing GATT dispute settlement mechanism dictate that negotiation and consensus be the central components of a dispute settlement procedure for a services trade agreement. It is of overriding importance that the dispute settlement procedure remain flexible while the new agreement is tested by the trading system. An anti-legalist approach to dispute resolution would provide this necessary flexibility. Recent experience in GATT makes clear, however, that this approach cannot adequately address persistent delays in the dispute resolution process. Incorporation of both the panel process and the timetables adopted in Montreal would expedite the process. In sum, a multilateral trade in services agreement will have a better chance of success if it includes a dispute settlement procedure that emphasizes conciliation and voluntary settlement, but retains enough formal characteristics to ensure that the system functions efficiently and effectively.